No. 78-1914

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNIROYAL ENGLEBERT BELGIQUE, S.A.,
a Belgian corporation,

Appellant,

vs.

JOHN DARRILL CONNELLY,

Appellee.

On Appeal from the Supreme Court of
the State of Illinois

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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Appellant, Uniroyal Englebert Belgique, S.A. ("Englebert Belgique"), pursuant to Rule 16.4 of the Rules of this Court, files this Brief in Opposition to Appellee's Motion to Affirm in order that several misstatements made in that Motion may be rectified.

STATEMENT OF THE CASE

Appellee misstates the Record when he asserts that Englebert Belgique sold tires "pursuant to its marketing scheme" and with the "knowledge and expectation" that they would be used in Illinois (Motion to Affirm, pp. 3, 5, 8, 12).

The Illinois Supreme Court made no such finding since there is no proof to support such a claim. The only proof on that issue is the testimony of Englebert Belgique, through its president, that "we never know where our tires could" be used.* Nothing relating to the tire, after its sale by appellant in Belgium, involved Englebert Belgique since the tire's use and distribution were undisputedly controlled solely by General Motors (Jurisdictional Statement, App. 2). Accordingly, appellee has not, and cannot, controvert the fact that Englebert Belgique had no contract or distributor relationship with anyone in Illinois, and it never aimed or directed any marketing effort into Illinois.

DECISION BELOW

Appellee concedes that the Illinois Supreme Court did not hold that Englebert Belgique committed a tortious act in Illinois (Jurisdictional Statement, p. 7). Appellee, however, incorrectly asserts that the Illinois Supreme Court found that Englebert Belgique had transacted business in Illinois (Motion to Affirm, pp. 2, 4). Subsequent to the Petition for a Rehearing filed by appellant with the Illinois Supreme Court, the modified opinion of that court expunged any reference to transaction of business by Englebert Belgique and merely concluded that Englebert Belgique's conduct somehow satisfied the requirements of due process (Jurisdictional Statement, App. 7-11).

SUBSTANTIALITY OF THE FEDERAL QUESTION

In *Rush* v. *Savchuk,* 245 N.W.2d 624, 272 N.W.2d 888 Minn.) *prob. juris* noted, ... U.S. ....., 99 S.Ct. 1211 (1979) (No. 78-952), this Court will consider whether a

* Excerpts of Record on Appeal in Illinois Supreme Court; Dep. of A. Englebert, pp. 23-24.

Minnesota state court can require a non-resident to defend a tort claim in Minnesota where the tort occurred outside Minnesota. In *World Wide Volkswagen Corp.* v. *Woodson,* 585 P.2d 351 (Okla. 1978), *cert. granted,* ..... U.S. ....., 99 S.Ct. 1212 (1979) (No. 78-1078), this Court will consider whether an Oklahoma court can require a New York retailer to come to Oklahoma to defend a tort claim.

Appellee's assertion that the forthcoming decision of this Court, on those obviously comparable issues, "will have no bearing on this" case (Motion to Affirm, p. 6), is absurd. This Court has heretofore not reviewed the question of long arm jurisdiction in a personal injury situation. Since the critical elements in *Rush* and *Woodson* are so similar to the instant situation, this Court's discussion of the requirements of due process applicable to tort litigation should be applied by the Illinois Supreme Court before the instant jurisdictional issue is finally resolved.

DECISIONS BY OTHER COURTS

Appellee asserts (Motion to Affirm, p. 11) that the instant exercise of personal jurisdiction by the Illinois court over a non-resident for an out-of-state tortious act (where the non-resident's only contact with the forum was the presence of a previously manufactured product) is *not a unique* holding and construction of the Due Process Clause, as Englebert Belgique had demonstrated in its Jurisdictional Statement (pp. 15-19).

No decision has been cited to this Court nor has appellee ever cited any decision to the lower courts which has so expanded the reach of the long arm jurisdiction by any state. Most certainly, appellee's string citation of decisions (Motion to Affirm, p. 8) does not support the holding of the Illinois court since *every* cited decision involved a *tort which had occurred within the forum state.*

Moreover, the recent decisions of the *en banc* Eighth Circuit in *Hutson* v. *Fehr Bros. Inc.*, 584 F.2d 833 (8th Cir.) *cert. denied,* ..... U.S. ....., 99 S.Ct. 573 (1978) and of the Supreme Court of Michigan in *Hapner* v. *Rolf Brauchli, Inc.*, 404 Mich. 160, 273 N.W.2d 822 (1978) (Jurisdictional Statement, p. 17) are directly contrary to the instant holding by the Illinois Supreme Court. Those courts correctly determined that the Due Process Clause prevents a state from exercising personal jurisdiction over a foreign manufacturer, who has never marketed in the state or made any decision to sell there, even though the manufacturer's product happened to be used in that state.

Appellee fails to acknowledge, let alone address, the obvious and substantial difference between a non-resident defendant who was merely aware that someone else *might* take a product anywhere in the world, including the forum state, and a non-resident defendant whose conduct established a "purposeful availing" of the benefits and protections of the forum state. That difference was the basis for the holdings by the Eighth Circuit and the Michigan Supreme Court; mere foreseeable presence does not satisfy the requisite purposeful availing.

Due process has, therefore, not been satisfied merely because a non-resident's product at some time happened to be brought into the forum state.

Respectfully submitted,

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